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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

NATHAN A. CHAPMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 18, 2010

QUESTION PRESENTED

Whether criminal defense counsel provides the "Assistance" guaranteed by the Sixth Amendment by making a tactical decision regarding the conduct of a trial over the defendant's objection.

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INTRODUCTION

This case turns on the simple and fundamental point that a criminal trial is all about the *defendant*'s, not his *counsel*'s, right to life, liberty, or property. Thus, while the Sixth Amendment guarantees the "Assistance" of counsel, the defendant ultimately remains the master of his own defense. Counsel serves as the defendant's agent, but the defendant is always free to revoke or limit that agency. It follows that, where the defendant and counsel disagree, a court must heed the defendant's, not his counsel's, wishes.

In this case, the Fourth Circuit departed from these bedrock principles. The court acknowledged that some decisions in the criminal process—whether the defendant should plead guilty, waive a jury, testify on his own behalf, or take an appeal—are so fundamental that they require consultation with, and consent from, the defendant. But apart from these specific decisions, the Fourth Circuit broadly held, defense counsel alone has the "right" to make all other decisions regarding the conduct of a criminal trial, *even over the defendant's express objections*. According to the Fourth Circuit, "if consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client." App. 8a.

That is a *non sequitur* of truly epic proportions that turns our representational system of justice on its head. It is one thing to recognize that counsel serves as the defendant's agent in the context of criminal proceedings and is generally free to make

decisions on the defendant's behalf without consulting with, or securing consent from, the defendant. But it is another thing altogether to assert that counsel is thereby free to override express instructions and bind the defendant over his objections. Just because counsel is not required to secure the defendant's consent for a particular decision, in other words, does not mean that counsel has a "right" to ignore his client's instructions. As Justice Scalia has put it, "action taken by counsel over his client's objection ... would have the effect of revoking the agency with respect to the action in question." *Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (opinion concurring in the judgment). Under no circumstances does counsel provide the "Assistance" guaranteed by the Sixth Amendment by making a tactical decision regarding the conduct of a criminal trial over the defendant's objection.

The Fourth Circuit decision below (like the Eleventh Circuit decision on which it relies, *United States v. Burke*, 257 F.3d 1321, 1323-24 (11th Cir. 2001)) squarely conflicts not only with this Court's landmark decision holding that the right to defend is personal to the defendant, *see Faretta v. California*, 422 U.S. 806, 818-36 (1975), but also with decisions by the North Carolina and Tennessee Supreme Courts holding as a matter of federal constitutional law that in the event of a disagreement between counsel and defendant over a tactical decision regarding the conduct of a criminal trial, the defendant's wishes must control, *see, e.g.*, *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994); *State v. Ali*, 407 S.E.2d 183, 188-90 (N.C. 1991); *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1999). The decision below thus leads to the anomaly that a

defendant in *federal* court in North Carolina has diminished federal constitutional rights as compared to a defendant in *state* court in North Carolina. Because the decision below not only conflicts with this Court's precedents but also exacerbates a conflict among federal appellate courts and state supreme courts on a matter of federal constitutional law, *see* S. Ct. R. 10(a), this Court should grant review.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 593 F.3d 365 and reprinted in the Appendix ("App.") at 1-15a. The Fourth Circuit's unreported order denying rehearing and rehearing en banc is reprinted at App. 16a. The district court's opinion is reported at 2008 WL 3896116, and reprinted at App. 18-23a.

JURISDICTION

The Fourth Circuit issued its decision on January 29, 2010, and denied a timely rehearing petition on March 30, 2010. App. 1a, 16a. On June 21, 2010, the Chief Justice extended the time within which to file this petition until August 27, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Background

In 2003, petitioner Nathan A. Chapman Jr. was indicted in the U.S. District Court for the District of Maryland on various charges of fraud and false statements stemming from complex securities transactions. The trial took place in the summer of 2004.

After closing arguments, Chapman's defense counsel brought to the district court's attention that, in rebuttal arguments, the Government had made comments pertaining to a subject that the court had previously ruled inadmissible. App. 31a. The court (Quarles, J.) told counsel to draft a curative instruction. *Id.* Counsel then stated that the defense would be moving for a mistrial. *Id.* The following colloquy thereupon ensued:

> THE COURT: You want one [a mistrial]?
>
> [CHAPMAN'S COUNSEL]: With prejudice.
>
> THE COURT: Nope. I'll give you a mistrial without [prejudice] if you want one. I give mistrials regularly. If you want a mistrial, you'll get one.
>
> [CHAPMAN'S COUNSEL]: We're just preserving the record, and wanting one with prejudice, Your Honor.
>
> THE COURT: No. If you want a mistrial, don't play with me on that, because I'll give you a mistrial. I have nothing to do but be here again. If you want to try this at your client's expense again—do you want a mistrial?

> [CHAPMAN'S COUNSEL]: No, Your Honor.
>
> THE COURT: I'm sorry. You want a mistrial?
>
> [CHAPMAN'S COUNSEL]: Only with prejudice. If Your Honor would consider with prejudice—
>
> THE COURT: No, no, no. I'll give you one without prejudice if you want.
>
> [CHAPMAN'S COUNSEL]: No, Your Honor.

App. 31-32a.

During this colloquy, Chapman himself affirmatively indicated that he wanted to accept the court's offer of a mistrial, which is why the district court said, "I'm sorry. You want a mistrial?" App. 32a. As Chapman later explained:

> Judge Quarles indicated to my defense counsel ... that he was prepared to grant the mistrial motion. He asked [counsel] if he wanted a mistrial. At this point the Judge's gavel was raised indicating that he was prepared to grant a mistrial. I immediately told my counsel, ... Yes!, indicating my instructions to accept the mistrial. My instructions were said loud enough to be heard by those in attendance at my trial.

App. 24a. That account is buttressed by a sworn declaration from a member of the defense team:

> When Judge Quarles stated that he was prepared to grant a mistrial and inquired of [defense counsel] if [counsel] wanted him to grant a mistrial, I heard Mr. Chapman say "yes" to his counsel .... I was seated in the first row of the gallery behind the defense

> table, approximately eighteen feet away. Mr. Chapman's vocalization of "yes" was loud enough for me to clearly hear him from my location.

App. 28a.

The district court, however, permitted defense counsel to overrule his client, and the trial proceeded. Chapman was subsequently convicted and sentenced to more than five years in prison. The Fourth Circuit affirmed the conviction on direct appeal, *see United States v. Chapman*, No. 04-5010, 209 F. App'x 253 (4th Cir. Dec. 8, 2006) (unpublished), and this Court thereafter denied a petition for a writ of certiorari, *see Chapman v. United States*, 550 U.S. 949 (2007).

B. Proceedings Below

In 2008, Chapman filed a *pro se* federal habeas petition in the U.S. District Court for the District of Maryland, alleging, *inter alia*, that he received ineffective assistance when his defense counsel rejected the district court's offer of a mistrial over his express instructions to the contrary. *See* App. 24-27a. In support of the petition, Chapman attached the affidavit of a member of the defense team supporting his rendition of events. *See* App. 28-29a.

The district court (Quarles, J.) denied the petition without holding an evidentiary hearing. App. 18-23a. According to the district court, Chapman's ineffective-assistance claim failed as a matter of law because "Chapman's counsel was within his discretion as attorney to move forward with the case, *even though it was against Chapman's wishes*." App. 22a (emphasis added).

The Fourth Circuit granted Chapman's *pro se* motion for a Certificate of Appealability on this issue, *see* App. 17a, and appointed the undersigned counsel to represent Chapman. The Fourth Circuit, however, affirmed the district court's dismissal of the petition. App. 1-15a. The majority broadly held that criminal defense counsel has the unfettered "right" to make tactical decisions at trial over the defendant's objections. App. 3-11a. Judge Michael concurred in the judgment, concluding that it was reasonable on the facts of this case (even though, as the majority pointed out, *see* App. 4-5a n.*, those facts were disputed and the district court never held an evidentiary hearing) for Chapman's counsel to override his client's instructions. App. 12-15a. The Fourth Circuit denied a subsequent rehearing petition, *see* App. 16a, and this petition follows.

REASON FOR GRANTING THE WRIT

Criminal Defense Counsel Does Not Provide The "Assistance" Guaranteed By The Sixth Amendment By Making A Tactical Decision Regarding The Conduct Of A Trial Over The Defendant's Objection.

The Fourth Circuit held below, echoing the Eleventh Circuit, that a criminal defense attorney has the "*right* to make tactical decisions about the conduct of a criminal trial [even] if the client expresses disagreement with the attorney's decision." App. 11a (emphasis added); *see also id.* at 4a (endorsing the proposition that "the decision belongs to the attorney," and the defendant's disagreement with that decision is "simply irrelevant"); *Burke*, 257 F.3d at 1324 ("[T]he decision to refrain from asking the court for a mistrial is a tactical decision

entrusted to defense counsel, binding the defendant *even when the defendant has expressed a contrary wish to his lawyer*.") (emphasis added). It is hard to imagine a more clearly incorrect statement of the law. The only "right" at issue here is a criminal defendant's Sixth Amendment right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

And that right, this Court has explained, cannot be infringed on the ground that an attorney knows better than a criminal defendant what is in the defendant's best interests. *See Faretta*, 422 U.S. at 832-35. To the contrary, the Sixth Amendment "grants to the accused *personally* the right to make his defense." *Id.* at 819 (emphasis added). The possibility that a defendant may exercise that right unwisely provides no basis to negate its existence—just as the First Amendment guarantees the right to free speech even though people may live to regret what they say.

The Sixth Amendment right to the "Assistance" of counsel, as *Faretta* explains, leaves the defendant in control of his defense. "[A]n assistant, however expert, is still an assistant." *Id.* at 820. If counsel were free to override a defendant's decisions, then counsel would be "not an assistant, but a master; and the right to make a defense [would be] stripped of the personal character upon which the Amendment insists." *Id.* (footnote omitted). Thus, counsel's authority to make decisions binding on the defendant "can only be justified ... by the defendant's consent." *Id.* "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a

very real sense, it is not his defense." *Id.* at 821. A criminal defendant thus has the "power, if present [at his trial], to give advice or suggestion *or even to supersede his lawyers altogether* ...." *Id.* at 816 (emphasis added). Indeed, the law could scarcely be otherwise, given that it is the defendant, not his counsel, "who suffers the consequences if the defense fails." *Id.* at 819-20; *see also id.* at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.").

The Fourth Circuit did not address (or even cite) *Faretta*, but started its analysis from the premise that "[i]t is by now well-established that in a criminal trial, defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." App. 5a (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004)). Only a very few decisions are so "fundamental" that they require counsel affirmatively to obtain the defendant's consent. App. 5-6a. The Fourth Circuit contrasted such "fundamental" decisions with run-of-the-mill "tactical" decisions that do *not* require a defendant's consent. *See id.* Because "decisions involving mistrials—whether to seek a mistrial or accept a mistrial offered by the trial court—are tactical decisions left to the sound judgment of counsel," the court declared, they do not require the defendant's consent. App. 11a; *see also id.* at 5-8a.

These points are both uncontroversial and irrelevant. The problem here is not that defense counsel rejected the district court's offer of a mistrial without securing Chapman's *consent*, but that defense counsel rejected the district court's offer of a mistrial over Chapman's *objection*. Those are two

totally different issues. As the Fourth Circuit acknowledged, Chapman does not argue "that counsel should have consulted with him before rejecting the mistrial offer." App. 4a. "Instead, Chapman contends only that counsel's performance was deficient because counsel ignored Chapman's instructions to accept the mistrial offered by the trial court." *Id.*; *see also* App. 7a ("[Chapman] does not argue that decisions regarding mistrials are so fundamental that they must be made by the client rather than the attorney.").

The Fourth Circuit fused the two issues together by holding that "[a] criminal defense attorney is obligated to follow his client's wishes *only* with regard to the fundamental issues that must be personally decided by the client." App. 7a (emphasis added). In other words, if counsel is entitled to make a decision without the defendant's consent, then counsel is entitled to ignore the defendant's instructions. "[I]f consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client." App. 8a.

The Fourth Circuit thereby turned the law on its head. As this Court has long recognized, the client is the principal and the attorney is his agent. *See, e.g.*, *Gonzalez*, 553 U.S. at 248-49; *New York v. Hill*, 528 U.S. 110, 115 (2000); *Faretta*, 422 U.S. at 820-21 & n.16. Under basic principles of agency law, an agent has the authority to bind the principal within the scope of the agency. *See, e.g.*, *Restatement (Third) of the Law of Agency* § 1.01 cmt. c (2006). This Court's

precedents carving out a small number of fundamental decisions as to which the defendant personally must consent represent a narrow exception to this general agency principle. But that exception, which seeks to safeguard the defendant's rights, in no way limits the defendant's authority over his counsel. The defendant always remains free to revoke or limit the agency; counsel's authority to make decisions binding on the defendant ultimately flows from the defendant's consent. *See Faretta*, 422 U.S. at 820; *see also Restatement (Third) of Agency* § 8.09(2) ("An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal."); *Restatement (Third) of the Law Governing Lawyers* § 21 cmt. b (2000) ("[T]he client may limit the lawyer's authority by contract or instructions."); *id.* § 21 cmt. d ("A lawyer may not continue a representation while refusing to follow a client's continuing instruction."). That explains why counsel cannot ignore a defendant's instructions, because "action taken by counsel over his client's objection ... would have the effect of revoking the agency with respect to the action in question." *Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring in the judgment).

That is why, in cases holding that a defendant need not consent to particular decisions by counsel, both this Court and other federal courts always have emphasized that the situation would be different if the defendant affirmatively objected. Thus, in *Gonzalez* this Court noted that "we do not have before us an instance where a defendant instructs the lawyer or advises the court in an explicit, timely way" of an objection to counsel's decision. 553 U.S.

at 246. Similarly, the Sixth Circuit has held, in the context of a mistrial motion, that "'petitioner is bound by his counsel's choice *in the absence of express objection*.'" *Watkins v. Kassulke*, 90 F.3d 138, 142-43 (6th Cir. 1996) (emphasis added; quoting *Armstrong v. United States*, 367 F.2d 821, 821 (7th Cir. 1966)); *see also Hawkins v. Hannigan*, 185 F.3d 1146, 1155 (10th Cir. 1999) ("'[C]ounsel in a criminal case may waive his client's Sixth Amendment right of confrontation by stipulating to the admission of evidence, *so long as the defendant does not dissent from his attorney's decision*.'") (emphasis added; quoting *United States v. Stephens*, 609 F.2d 230, 232-33 (5th Cir. 1980)).

It does not follow, in short, that because counsel need not secure a defendant's consent to certain tactical decisions, "the law places [those] decisions *solely* in the hands of the criminal defense attorney." App. 10a (emphasis added); *see also* App. 7a ("If the decision is a tactical one left to the sound judgment of counsel, the decision must be just that—left to the judgment of counsel."). Tactical decisions regarding the conduct of a criminal trial are in counsel's hands only to the extent that the defendant remains content to leave them there. Contrary to the Fourth Circuit's assertion, criminal cases do not entail any "reallocation of rights and duties" between attorney and client, App. 10a, and an attorney has no "right to make tactical decisions about the conduct of a criminal trial if the client expresses disagreement with the attorney's decision," App. 11a.

Unfortunately, the Fourth Circuit's decision in this case cannot be dismissed as an aberration. To the contrary, the Fourth Circuit relied on an earlier

Eleventh Circuit decision that also concluded that counsel was entitled to ignore the defendant's express instructions with respect to a tactical decision in a criminal trial. *See Burke*, 257 F.3d at 1324. That case, like the decision below, is written as if *Faretta* did not exist. *Burke* starts from the premise that a defendant has *no* say over the conduct of his criminal trial other than the limited decisions as to which counsel must seek his consent. Giving the defendant the final say over any other decisions, the Eleventh Circuit declared, would "erode defense counsel's authority at trial." *Id.* at 1323; *see also id.* ("Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point."). Indeed, *Burke* warned that "[w]hen the defendant is given the last word about how his case will be tried, the defendant becomes his own trial lawyer," *id.*, as if the Sixth Amendment and *Faretta* did not guarantee precisely that. The Fourth Circuit below approvingly block-quoted this portion of *Burke*. *See* App. 10-11a.

In sharp contrast to this case and *Burke*, both the North Carolina and Tennessee Supreme Courts have held that, under the Sixth Amendment, a criminal defendant has the final word on tactical decisions at his trial. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59. In each of those cases, as here, a defendant and his counsel disagreed about a tactical decision in a criminal trial. In each of those cases, however, the trial court followed *Faretta* and gave the defendant the final say. After the defendants in those cases were convicted and sentenced, they appealed on the ground that it was error for the trial courts to have allowed them to overrule their counsel. Both state

supreme courts rejected that argument, holding that the defendants had a federal Sixth Amendment right to overrule their trial counsel, and could not thereafter complain if they came to regret the exercise of that right. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59.

These decisions cannot be reconciled with the decision below and *Burke*. As the North Carolina Supreme Court has explained, "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali*, 407 S.E.2d at 189; *see also id.* ("The attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred.") (internal quotation omitted). After all, "[t]he attorney-client relationship rests on principles of agency, and not guardian and ward," and "[n]o person can be compelled to take the advice of his attorney." *Id.* (internal quotation omitted); *see also Zagorski*, 983 S.W.2d at 658 ("Ultimately, ... the right to a defense belongs to the defendant."); *id.* at 659 ("When a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision.").

The decision below thus creates the anomalous situation that a criminal defendant on trial in North Carolina has greater federal constitutional rights in state than in federal court. A defendant's Sixth Amendment right to make a tactical decision in his criminal trial should not turn on whether he finds

himself in state or federal court. Needless to say, only this Court can bring uniformity on this important question of federal constitutional law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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August 18, 2010

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN A. CHAPMAN, JR.,

Defendant-Appellant.

No. 08-7976

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(1:03-cr-00301-WDQ-1; 1:08-cv-01268-WDQ)

Argued: December 1, 2009

Decided: January 29, 2010

Before TRAXLER, Chief Judge, and WILKINSON and MICHAEL, Circuit Judges.

Affirmed by published opinion. Chief Judge Traxler wrote the majority opinion, in which Judge Wilkinson joined. Judge Michael wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Lartease Martrell Tiffith, KIRKLAND & ELLIS, LLP, Washington, D.C., for Appellant. Jefferson McClure Gray, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF**: Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

OPINION

TRAXLER, Chief Judge:

After being convicted of numerous charges, including mail and wire fraud, *see United States v. Chapman*, No. 04-5010, 2006 WL 3539146 (4th Cir. Dec. 8, 2006), Nathan Chapman filed a motion under 28 U.S.C.A. § 2255 challenging his convictions on several grounds. The district court denied relief. We granted a certificate of appealability to permit Chapman to appeal the district court's rejection of his claim that trial counsel was ineffective for ignoring Chapman's direction to accept the district court's offer of a mistrial. For the reasons set forth below, we affirm.

I.

Chapman was the chief executive officer and majority shareholder of various financial services companies, and a portion of the charges against Chapman involved his use of "business development funds" provided by these companies for personal rather than business purposes. The government's theory of the case was that Chapman needed the business development funds to support a lifestyle that he could not otherwise afford. The trial court permitted the government to present, as proof of Chapman's motive, *see* Fed. R. Evid. 404(b), evidence of substantial loans (eventually totaling more than $1 million) that Chapman took from his companies but never repaid.

After the government's rebuttal closing argument, counsel for Chapman objected to a reference by the government to the loans, believing the reference went beyond the limitations the trial

court had placed on the use of the loan evidence. The trial court stated that counsel "might be right," J.A. 20, and directed counsel for Chapman to draft a curative instruction to be given to the jury. Counsel for Chapman then, "just for the record," moved for a mistrial with prejudice. J.A. 20. The trial court offered to grant Chapman a mistrial *without* prejudice, but counsel for Chapman declined, insisting that the mistrial should be with prejudice. The case proceeded, and the trial court gave the curative instruction to the jury. The jury ultimately convicted Chapman on 22 of the charges alleged in the indictment.

In his § 2255 motion, Chapman contended that when the trial court offered to grant a mistrial without prejudice, he instructed his attorney to accept the offer. Chapman argued that his attorney, by rejecting his instructions to accept the mistrial, was constitutionally ineffective and that Chapman was therefore entitled to a new trial. The district court rejected Chapman's claim, concluding that the decision to go forward with the trial rather than accept a mistrial without prejudice was a tactical decision to be made by counsel, not Chapman.

II.

A criminal defendant's right to counsel as guaranteed by the Sixth Amendment is, of course, a guarantee of the right to *effective* assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on a Sixth Amendment claim of ineffective assistance of counsel, "the defendant must show that his counsel's performance 'fell below an objective standard of reasonableness' in light of the prevailing professional norms." *Lawrence v.*

Branker, 517 F.3d 700, 708 (4th Cir. 2008) (quoting *Strickland*, 466 U.S. at 688). If the defendant can establish that his attorney's performance was deficient, the defendant must then demonstrate that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Chapman's ineffective-assistance claim is a narrow one. Chapman does not argue that, given the manner in which the trial had unfolded, the only reasonable decision was to accept the mistrial offer. Nor does Chapman argue that counsel should have consulted with him before rejecting the mistrial offer. Instead, Chapman contends only that counsel's performance was deficient because counsel ignored Chapman's instructions to accept the mistrial offered by the trial court. The government, however, argues that decisions involving mistrials—whether to ask for a mistrial and whether to accept an offer of a mistrial—are tactical decisions that must be made by the attorney, not the defendant. Because the decision belongs to the attorney, the government argues that Chapman's disagreement with the decision made by counsel is simply irrelevant.* We agree with the government.

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* The government seems to challenge the factual underpinnings of Chapman's claim, questioning whether the trial court was serious in its offer of a mistrial and noting that one of Chapman's trial attorneys stated in an affidavit that he consulted with Chapman about the mistrial and that Chapman agreed with his decision. Because the district court rejected Chapman's claims without holding an evidentiary hearing, we

It is by now well-established that in a criminal trial, defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004). "Decisions that may be made without the defendant's consent primarily involve trial strategy and tactics, such as what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998) (internal quotation marks omitted). However, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Nixon*, 543 U.S. at 187.

The only decisions that have been identified by the Supreme Court as belonging exclusively to the defendant are "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The Supreme Court has never suggested that decisions about mistrials are "of such a moment" that they can be made only by the defendant himself, and every circuit to consider the question has concluded that decisions regarding mistrials belong to the attorney, not the client. *See United States v. Burke*, 257 F.3d 1321, 1324 (11th Cir. 2001) ("We ... reject Defendant's contention that the decision to request a

---

must review the facts in the light most favorable to Chapman. *See United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007).

mistrial is a fundamental decision that only a defendant can make."); *United States v. Washington*, 198 F.3d 721, 723 (8th Cir. 1999) ("Washington argues that the defendant must be allowed to make the ultimate decision on whether to request a mistrial. We disagree and hold that the decision to make such a request is a strategic decision for counsel."); *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996) ("[W]here ... defense counsel consents as a matter of trial strategy to a mistrial, that consent binds the defendant ..., regardless of whether the defendant participates in the decision."); *Galowski v. Murphy*, 891 F.2d 629, 639 (7th Cir. 1989) ("The decision whether to move for a mistrial or instead proceed to judgment with the expectation that the client will be acquitted is a matter of trial strategy."). As the Eighth Circuit explained,

> the decision to move for a mistrial often must be made in a split-second and it involves numerous alternative strategies such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding. Moreover, counsel is generally in a better position than a lay person to judge the impact of a potentially prejudicial incident in the context of the entire trial.

Washington, 198 F.3d at 724 (citation omitted).

We likewise conclude that decisions regarding a mistrial are tactical decisions entrusted to the sound judgment of counsel, not the client. Preliminarily, we note that mistrial issues bear no similarity, in nature or significance, to the decisions that the Supreme Court has identified as belonging solely to

the defendant. Moreover, deciding whether to seek a mistrial (or whether to accept or reject a mistrial offered by the trial court) involves an on-the-fly balancing of the probable damage caused by the trial error against the likelihood that a different jury might be more inclined to acquit—a question that itself requires considering how receptive the current jury is to the defendant, whether key witnesses have testified as anticipated, etc. Given the many issues that must be identified, evaluated, and weighed when determining whether to seek or accept a mistrial, we think it clear that the decision is a tactical one to be made by counsel, not the client.

As noted above, Chapman does not contend otherwise—that is, he does not argue that decisions regarding mistrials are so fundamental that they must be made by the client rather than the attorney. Chapman nonetheless insists that if a mistrial is offered by the trial court *and* the defendant expresses his opinion on whether the offer should be accepted, counsel is obligated to follow the defendant's instructions. We disagree.

A criminal defense attorney is obligated to follow his client's wishes only with regard to the fundamental issues that must be personally decided by the client. As to those limited issues—pleading guilty, waiving a jury, taking the stand, and appealing a conviction or sentence—"an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Nixon*, 543 U.S. at 187. If the decision is a tactical one left to the sound judgment of counsel, the decision must be just that—left to the judgment of counsel. Counsel need not consult with the client

about the matter or obtain the client's consent. *See id.* (The "duty to consult with the client regarding important decisions ... does not require counsel to obtain the defendant's consent to every tactical decision." (internal quotation marks omitted)); *Sexton*, 163 F.3d at 885 (whether to file a motion to suppress "is a classic tactical decision" for which consent from the defendant was not required).

And if consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client. For example, which witnesses to call is a classic tactical decision left to counsel, *see Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008) ("[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney."), and it remains a decision for counsel even when the client disagrees, *see Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991) ("[T]he trial court overreached its authority and infringed upon the relationship between Blanco and his attorneys by requiring defense counsel to call two additional witnesses [as requested by the defendant]. Generally, trial tactics are for defense counsel to formulate. The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel." (footnotes omitted)). Likewise, we believe that whether to seek or accept a mistrial is a matter left to the sound judgment of counsel, even if the client disagrees with counsel's decision. *See Burke*, 257 F.3d at 1324 ("[T]he decision to refrain from asking the court for a mistrial is a tactical decision entrusted to defense counsel, binding the defendant *even when the*

defendant expressed a contrary wish to his lawyer." (emphasis added)). The reasonableness of the tactical decision actually made by counsel is of course subject to challenge, but the decision is not unreasonable simply because the client expressed a contrary view.

Chapman, however, views his position as a necessary consequence of the agency relationship between the defendant and his attorney:

> [A]s defendant's counsel and agent, defense counsel is permitted to make decisions that bind the defendant as agents generally do with regard to matters within the scope of their authority. However, that authority is binding only unless and until revoked. When the defendant specifically instructs his agent to accept a court's offer of a mistrial on his behalf, to the extent that the defendant's request is reasonable, defense counsel as his agent is obligated to do so—his agency to do otherwise is revoked.

Brief of Appellant at 19. While it is of course true that an attorney is the agent of his client, the attorney's obligations in a criminal case do not precisely mirror the obligations of a general agent representing his principal on civil matters. Notwithstanding the fact that an agent is generally authorized to act for the principal in all matters within the scope of the agent's authority, the law requires the criminal defendant, not his attorney, to make the critical decisions about whether to plead guilty or go to trial, whether to testify, and whether to appeal. And notwithstanding the fact that a principal generally has the authority to dictate the

manner in which his agent will carry out his duties, the law places certain tactical decisions solely in the hands of the criminal defense attorney. This reallocation of rights and duties is necessary to give effect to the constitutional rights granted to criminal defendants and to insure the effective operation of our adversarial system, where defense attorneys must protect the interests of their clients while also serving as officers of the court. *See Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." (footnote omitted)). As the Eleventh Circuit has explained,

> Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point. He is an officer of the court and a professional advocate pursuing a result—almost always, acquittal—within the confines of the law; his chief reason for being present is to exercise his professional judgment to decide tactics.
>
> .... When the defendant is given the last word about how his case will be tried, the defendant becomes his own trial lawyer. If we add to the list of circumstances in which a defendant can trump his counsel's decision, the adversarial system becomes less effective as the opinions of lay persons are substituted for the judgment of legally trained counsel. The sound

> functioning of the adversarial system is critical to the American system of criminal justice. We intend to defend it.

Burke, 257 F.3d at 1323. We therefore reject Chapman's claim that an attorney loses the right to make tactical decisions about the conduct of a criminal trial if the client expresses disagreement with the attorney's decision.

III.

To summarize, we conclude that decisions involving mistrials—whether to seek a mistrial or accept a mistrial offered by the trial court—are tactical decisions left to the sound judgment of counsel. The decision remains counsel's to make even if the client expresses disagreement with the decision, and counsel's decision is not unreasonable simply because the client disagrees. The district court therefore properly rejected Chapman's claim that his attorney provided constitutionally ineffective assistance of counsel by refusing, over Chapman's instructions to the contrary, the trial court's offer of a mistrial without prejudice. Accordingly, we hereby affirm the district court's order denying Chapman's § 2255 motion.

AFFIRMED

MICHAEL, Circuit Judge, concurring in the judgment:

I concur in the judgment but write separately to express my belief that we should be resolving this case on much narrower grounds. As the majority recognizes, "Chapman's ineffective-assistance claim is a narrow one." *Ante* at [4a]. Chapman simply argues that under the particular circumstances of this case, he received ineffective assistance when his lawyer refused to follow his express instruction to accept the district court's offer of a mistrial without prejudice. Instead of affirming on the narrow ground that Chapman's lawyer acted reasonably, the majority sweeps broadly and decides that a lawyer's decision to refuse a mistrial over his client's wishes and without consultation can never constitute ineffective assistance. I believe such a broad rule is both ill-advised and unnecessary to resolve this case.

There are at least three types of decisions where counsel's failure to seek or follow client input before acting could result in constitutionally ineffective assistance: (1) fundamental decisions requiring informed consent from the client; (2) important decisions requiring consultation with the client; and (3) decisions where the client has expressly instructed counsel on a particular course. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Gov't of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1437 (3d Cir. 1996). The majority has focused exclusively on the first type, that is, the fundamental decisions described in *Jones*. Nothing in this case has convinced me that the list of fundamental decisions in *Jones* should be expanded. But focusing

exclusively on the fundamental decision category inappropriately ignores the other two categories. In *Florida v. Nixon* the Supreme Court expressly recognized counsel's "duty to consult with the client regarding *important* decisions" as independent from the duty to both consult with the client *and* obtain his consent on *fundamental* decisions. 543 U.S. at 187 (emphasis added). The majority misreads this very portion of *Nixon* to support the proposition that for non-fundamental decisions "[c]ounsel need not consult with the client about the matter *or* obtain the client's consent." *Ante* at [7-8a] (emphasis added). There will be important decisions that require consultation with, but not consent from, the client. *See, e.g.*, *Weatherwax*, 77 F.3d at 1436 (duty to consult with client concerning possible mistrial motion after client's family raised fact that juror was reading prohibited materials). Similarly, there will be decisions on which counsel and client disagree that will at least require some form of accommodation. *See, e.g.*, *United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1984) (defendant's right to self-representation on appeal satisfied by allowing him to submit supplemental brief).

In assessing counsel's failure to consult with his client or follow an express instruction, I would follow the Third Circuit's analysis in *Weatherwax*. There, the court held that "[t]he constitutional duty to consult regarding issues on which counsel has the last word requires only that counsel act reasonably in light of the circumstances and what is likely to be accomplished by a consultation." 77 F.3d at 1437. In assessing reasonableness, the Third Circuit weighed the lawyer's actions against the "number of important purposes" served by the duty to consult,

including ensuring the client's ability to assist in his own defense, promoting open lawyer-client communications, and safeguarding the client's right to forgo his current representation if he disagrees with his lawyer. *Id.* at 1436-37. The reasonableness assessment is, of course, fact intensive and case specific.

I conclude that while the decision whether to accept a mistrial offered by the court will sometimes require a lawyer to consult with his client, it was nevertheless reasonable here for Billy Martin to refuse the offer against Chapman's expressed wishes and without consultation. The record does not indicate that Chapman even understood the difference between a mistrial with prejudice and a mistrial without prejudice, let alone the consequences of each in his case. Under these circumstances, *following* Chapman's instruction might well have constituted ineffective assistance of counsel. A closer question is whether Martin should have asked the court for time to consult with Chapman concerning the offer, but I again conclude that Martin's actions were reasonable. The district court was demanding an answer from Martin then and there. Martin had to make a decision on the fly, and there is no evidence that consultation would have prompted Chapman to hold his position and request new counsel.

I would not foreclose the possibility that, in other situations, counsel's failure to consult with his client or follow his express, informed wishes would constitute constitutionally ineffective assistance. Because I agree with the majority that counsel was

effective in Chapman's case, however, I concur in the result.

FILED: MARCH 30, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN A. CHAPMAN, JR.,

Defendant-Appellant.

No. 08-7976
(1:03-cr-00301-WDQ-1)
(1:08-cv-01268-WDQ)

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Wilkinson and Judge Michael.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: MAY 21, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN A. CHAPMAN, JR.,

Defendant-Appellant.

No. 08-7976
(1:03-cr-00301-WDQ-1)
(1:08-cv-01268-WDQ)

ORDER

Before this court is Nathan A. Chapman, Jr.'s request for a certificate of appealability to appeal the district court's order denying Chapman's post-conviction motion to vacate judgment filed pursuant to 28 U.S.C.A. § 2255 (West Supp. 2008). We have reviewed the record on appeal and GRANT a certificate of appealability on Chapman's claim that his counsel was ineffective for ignoring his direction to accept the district court's offer of a mistrial without prejudice after the prosecution made inappropriate comments to the jury. We DENY a certificate of appealability on all other issues and dismiss Chapman's appeal therefrom.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

NATHAN A. CHAPMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO.: WDQ-03-0301

CRIMINAL NO. : WDQ-08-1268

MEMORANDUM OPINION

Pending is Nathan A. Chapman, Jr.'s *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The Court has reviewed the papers and the record and determined that no evidentiary hearing is necessary. *See* Rule 8 of the Rules Governing § 2255 Proceedings. For the following reasons, Chapman's motion will be denied.

I. Background

On August 12, 2004, a jury found Chapman guilty on 23 counts of wire fraud, mail fraud, false statement to a federal government agency, investment advisory fraud, false statement on tax returns, and aiding and abetting.[1] On November 1,

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[1] The jury acquitted Chapman of seven counts of wire fraud, mail fraud, false statement on tax returns, false statement in connection with loan application, and engaging in monetary transactions in property derived from specific unlawful activity.

2004, Chapman was sentenced to 90 months imprisonment, three years of supervised release, restitution of $5,000,856, and a special assessment of $2,300.

On December 8, 2006, the Fourth Circuit affirmed Chapman's conviction, but remanded for resentencing in accord with *United States v. Booker*, 543 U.S. 220 (2005). *United States v. Chapman*, 209 F. App'x 253 (4th Cir. Dec. 8, 2005).[2] On May 14, 2007, the Supreme Court denied certiorari. *Chapman v. United States*, 127 S. Ct. 2286 (2007).

On May 14, 2008, Chapman filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

II. Analysis

A. Standard of Review

The Sixth Amendment guarantees the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, Chapman must show that: (1) counsel's deficient performance (2) prejudiced his defense. *Id.* at 687. Chapman must establish that counsel made errors so serious that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Chapman must also demonstrate a "reasonable probability that, but for counsel's

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The jury hung on two other counts of false statement on tax returns.

[2] On February 20, 2007, Chapman was resentenced to 63 months imprisonment.

unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Judicial scrutiny of attorney performance asks whether counsel's assistance was reasonable under the circumstances. *Id.* at 689.

B. Discussion

1. *Batson* Challenge

Chapman argues that his trial counsel was ineffective because he failed to raise properly a *Batson* objection to the Government's peremptory challenges and preserve the issue for appeal. The Government counters that the *Batson* challenge was reviewed by the trial Court and the Fourth Circuit.

The Government may not use its peremptory challenges to exclude minority jurors solely because of their race. *Batson v. Kentucky*, 476 U.S. 79, 91-92 (1986). Chapman's counsel raised *Batson* objections at trial, and the Court considered and overruled them. Trial Tr. vol. 1, 189-94, June 14, 2004. The Fourth Circuit affirmed because there was no evidence that the Government struck jurors based on their race. *Chapman*, 209 F. App'x at 261-64.

Absent evidence of the Government's racial animus or racially tainted verdicts, Chapman has not shown that he was prejudiced by his counsel's allege deficient performance. *See Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) (more allegations unsupported by evidence are not enough to show prejudice on an ineffective assistance of counsel claim;, *abrog'n on other grounds recog'd, Yeatts v. Angelone*, 166 F.3d 255 (4th Cir. 1999).

2. Decision Not To Request a Mistrial

Chapman directed his lawyer to move for mistrial; he argues that counsel was ineffective when he ignored that direction. The Government counters that counsel made a tactical decision that did not prejudice Chapman.

Attorneys have a duty to consult with their clients on important decisions about the case, but not on "'every tactical decision.'" *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (*quoting Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). Counsel generally has superior knowledge of a defendant's case and the criminal legal process, and is therefore in a better position to make tactical decisions. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). The only decisions on which a client *must* be consulted as a matter of law are "'whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal.'" *Nixon*, 543 U.S. at 187 (*quoting Jones v. Barnes*, 463 U.S. 745, 751 (1983)); *Sexton*, 163 F.3d at 885.

Whether an attorney pursues a mistrial does not require client approval. *United States v. Burke*, 257 F.3d 1321, 1324 (11th Cir. 2001) ("[T]he decision to refrain from asking the court for a mistrial is a tactical decision entrusted to defense counsel, binding the defendant even when the defendant expressed a contrary wish to his lawyer."); *United States v. Washington*, 198 F.3d 721, 723 (8th Cir. 1999); *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996); *Galowski v. Murphy*, 891 F.2d 629, 639 (7th Cir. 1989).

Chapman's counsel moved for a mistrial with prejudice because the prosecutor asked the jury to

consider certain loans and use of a credit card in deciding whether Chapman breached a fiduciary duty, after the Court had ruled that the evidence was not admissible for that purpose. Trial Tr. vol. 27, 189, July 29, 2004. The Court agreed that the comment was improper and offered to grant a mistrial without prejudice. *Id.* 189-190. Wanting only a mistrial with prejudice, counsel chose to continue the trial.[3] Chapman's counsel determined in his professional judgment that going forward with that jury was the "reasonable and prudent course of action."[4] William R. Martin Aff. ¶ 6, July 22, 2008. Chapman's counsel was within his discretion as attorney to move forward with the case, even though it was against Chapman's wishes.[5]

Further, Chapman has failed to show prejudice. He has not demonstrated that trial before a different jury would have ended with this acquittal.

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[3] According to counsel, Chapman concurred in the decision to continue with trial, in part because of recent publicity that he thought would be favorable to his case. Martin Aff. ¶ 5.

[4] Chapman's counsel also conferred with the other defense counsel before deciding to move forward with the case. Martin Aff. ¶ 5.

[5] Chapman has submitted an affidavit by his counsel, Nathaniel E. Jones, Jr., that 1) when the Court asked defense counsel if he wanted a mistrial he heard Chapman tell counsel that he wanted a mistrial, and 2) there was no discussion between defense counsel and Chapman about whether to accept a mistrial before counsel's decision to move forward in the case. Nathaniel E. Jones Aff. ¶ 3, May 13, 2008. As noted, defense counsel has the discretion to seek a mistrial and was not required to consult with the defendant about the decision.

Strickland, 466 U.S. at 694. As a result, Chapman's second claim of ineffective assistance of counsel must fail.

III. Conclusion

For the reasons discussed above, Chapman's motion will be denied.

August 18, 2008
Date

/s/
William D. Quarles, Jr.
United States District Judge

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

* * *

INTRODUCTION

My name is Nathan A. Chapman, Jr. I am petitioning the Court under 28 USC § 2255. I am presently incarcerated at FCI Morgantown in Morgantown, West Virginia.

At my trial and sentencing at District Court and during my appeal to the 4th Circuit Court I was represented by William R. Martin, partner at Blank Rome in Washington D.C. He later left Blank Rome and joined the firm of Sutherland Asbill Brennan, also in Washington, D.C. As a partner of this firm he represented me at my resentencing.

* * *

Ground Two: Denial of Effective Assistance of Counsel

On July 29th, after and as a result of the Government's closing argument, my Defense Counsels, Mark Rothenburg and William Martin moved a Motion for a Mistrial.

Judge Quarles indicated to my defense counsel, William Martin, that he was prepared to grant the mistrial motion. He asked Mr. Martin if he wanted a mistrial. At this point the Judge's gavel was raised indicating that he was prepared to grant a mistrial. I immediately told my counsel, Mr. Martin, Yes!, indicating my instructions to accept the mistrial. My instructions were said loud enough to be heard by those in attendance at my trial.

I have enclosed a statement from Mr. Nat Jones, one of my defense counsels, as evidence that he heard my statement of "yes" to Judge Quarles offer to grant a mistrial. I have also enclosed a copy of the appropriate section from the court record.

Under *Strickland v. Washington* (104 S.Ct. 2052) Mr. Martin had a "duty to consult with the Defendant on important decisions." This is especially true when I had already indicated in public court my wishes.

In *Ro[e] v. Flores-Ortega* (120 St. [1029,] 1038) the Court defined the term consult to mean "advising the Defendant about the advantages and disadvantages of making an appeal and make a reasonable effort to discover the client's wishes." Neither did Mr. Martin nor Mr. Rothenburg consult with me at all before making this series of important decisions. These decisions were contrary to my publicly expressed wishes.

Under *Staples v. DeCoster* (1973, App. DC) 159 US App. DC 326, 487 42d 1197, *"Duties of counsel to client in order to constitute reasonably competent assistance are to confer with client as often as necessary to ascertain potential defenses and discuss fully potential strategies and tactical choices, to advise the client of his rights and take all actions necessary to preserve them*, to make appropriate motions, to conduct appropriate factual investigations and to do adequate legal research, *substantial violation of any of these requirements can result in denial of effective representation.*

Since defense counsels had not discussed with me in advance their intention to move a mistrial, when Judge Quarles offered to grant the mistrial defense

counsels should have accepted it as I publicly expressed.

Barring that they should have requested an opportunity to consult with me. During which time they had a duty to explain to me the advantages and disadvantages of a mistrial and to ascertain my wishes.

Further if they had in mind accepting a mistrial if it was granted "with prejudice," they should have explained what "with prejudice" meant to me and how it affected a mistrial and my future rights. Defense counsels had a duty to explain to me the advantages and disadvantages of a "mistrial with prejudice" and ascertain my wishes.

This is especially true since defense counsels did the exact opposite of my publicly expressed wishes.

I was prejudiced by Mr. Martin's and Mr. Rothenburg's ineffectiveness by their failure to comply with their duty to consult with me on important decisions under *Strickland v. Washington*, *Ro[e] v. Flores-Ortega* and *United States v. DeCoster*. I was further prejudiced by Mr. Martin's failure to follow my publicly expressed wish to accept Judge Quarles mistrial offer.

It is important to note that defense counsel felt that the issue of the prosecutor comments was so important that it was included as an issue on my appeal. Yet, at the end of the Government's rebuttal closing argument he failed to accept Judge Quarles offer of a mistrial.

Further support of Defendant counsel ineffectiveness was the fact that he requested Judge Quarles to declare a mistrial with prejudice. I have

come to discovery the basis of a mistrial with prejudice. I do not believe that the facts in my case met the legal elements which have allowed Judge Quarles to declare a mistrial with prejudice.

My defense counsels were ineffective. It resulted in my being prejudiced by not receiving the mistrial which Judge Quarles offered and I indicated that I wished and instructed defense counsel to accept.

AFFIDAVIT

I, Nathaniel E. Jones, Jr., am an attorney admitted to practice law in the State of Maryland, and one of the defense counsel for Nathan A. Chapman, Jr. in the criminal trial of *United States v. Nathan A. Chapman, Jr.*, tried in the United States District Court for the District of Maryland (Baltimore), Case No. WDQ-03-0301, during the period June 14, 2004 through August 12, 2004, although not counsel of record, and not counsel at the defense table during the trial.

I was present in the courtroom on the day of the Motion for Mistrial, and the colloquy related thereto between Judge Quarles and Mr. William Martin and Mr. Marc Rothenberg, defense counsel for Chapman, on July 29, 2004, which is the subject of Ground Two of Mr. Chapman's § 2255 Motion.

When Judge Quarles stated that he was prepared to grant a mistrial and inquired of Mr. Martin if Mr. Martin wanted him to grant a mistrial, I heard Mr. Chapman say "yes" to his counsel, Mr. Martin. I was seated in the first row of the gallery behind the defense table, approximately eighteen feet away. Mr. Chapman's vocalization of "yes" was loud enough for me to clearly hear him from my location. There was no discussion between Mr. Chapman and his defense counsel regarding whether or not to accept Judge Quarles' offer to grant a mistrial.

I HEREBY SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY AND UPON PERSONAL KNOWLEDGE THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.

Dated 5/13/2008 /s/
Nathaniel E. Jones, Jr. Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

UNITED STATES OF AMERICA,

v.

NATHAN A. CHAPMAN, JR.,

Defendant

Criminal No.: WDQ-03-0301
Baltimore, Maryland
July 29, 2004
9:15 a.m.
(Volume XXVII)

THE ABOVE-ENTITLED CASE CONTINUED ON FOR TRIAL BEFORE THE HONORABLE WILLIAM D. QUARLES, JR., UNITED STATES DISTRICT JUDGE

APPEARANCES

On behalf of the Government:
JEFFERSON GRAY, AUSA
CRAIG WOLFF, AUSA

On behalf of the Defendant:
WILLIAM MARTIN, ESQUIRE
MARC ROTHENBERG, ESQUIRE
ALLISON FENNELL, ESQUIRE

Reported by:
Martin J. Giordano, RMR, CRR
Official Court Reporter
101 West Lombard Street
Room 3318
Baltimore, Maryland 21201
410-962-4504

* * *

MR. ROTHENBERG: Your Honor, we do have one issue before the jury comes in, if we could—

MR. MARTIN: Marshal?

THE MARSHAL: Do what?

THE COURT: Hold on for a moment. Yes?

MR. ROTHENBERG: Your Honor, the issue—Your Honor, an issue came up—just wait until the door is closed.

During Mr. Gray's rebuttal argument, he specifically made the argument to the jury that they should consider the loans and the credit card for a breach of fiduciary duty, and that goes afoul of the Court's ruling at the beginning of this case as to what the loans would be used for in this case. They were not going to be allowed to argue that they were part of any criminal scheme. Rather, the loans—

THE COURT: I tell you what. You might be right. Draft a curative instruction. I'll be glad to give it to the jury. Can you ask them to come in?

MR. ROTHENBERG: And, just for the record, we are moving for a mistrial based upon that.

THE COURT: You want one?

MR. ROTHENBERG: With prejudice.

THE COURT: Nope. I'll give you a mistrial without one if you want one. I give mistrials regularly. If you want a mistrial, you'll get one.

MR. ROTHENBERG: We're just preserving the record, and wanting one with prejudice, Your Honor.

THE COURT: No. If you want a mistrial, don't play with me on that, because I'll give you a mistrial.

I have noting to do but be here again. If you want to try this at your client's expense again—do you want a mistrial?

MR. MARTIN: No, Your Honor.

THE COURT: I'm sorry. You want a mistrial?

MR. MARTIN: Only with prejudice. If your Honor would consider with prejudice—

THE COURT: No, no, no. I'll give you one without prejudice if you want.

MR. MARTIN: No, Your Honor.

THE COURT: Okay. Granting it would be worth it just to see the look on Mr. Gray's face.

(Laughter.)

MR. MARTIN: If I said that, he'd be upset with me, Judge.

(Jury enters.)

THE COURT: Good afternoon, ladies and gentlemen.

* * *

No. 10-211

In the Supreme Court of the United States

NATHAN A. CHAPMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
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QUESTION PRESENTED

Whether petitioner's trial counsel rendered ineffective assistance of counsel by declining the district court's offer of a mistrial without prejudice, even though petitioner allegedly expressed a desire to accept the offer.

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In the Supreme Court of the United States

No. 10-241

NATHAN A. CHAPMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 593 F.3d 365. A prior opinion of the court of appeals is not published in the Federal Reporter but is available at 209 Fed. Appx. 253.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2010. A petition for rehearing was denied on March 30, 2010 (Pet. App. 16a). On June 21, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 27, 2010. The petition was filed on August 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of 11 counts of wire fraud, in violation of 18 U.S.C. 1343; three counts of investment advisory fraud, in violation of 15 U.S.C. 80b-6 and 80b-17; six counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of making false statements on tax returns, in violation of 26 U.S.C. 7206(1); and one count of making false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 1001. The court of appeals affirmed petitioner's convictions but remanded for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005). 209 Fed. Appx. 253 (4th Cir. 2006). This Court denied petitioner's petition for a writ of certiorari. 550 U.S. 949 (2007). Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his conviction. The district court denied the motion (Pet. App. 18a-23a), and the court of appeals affirmed (*id.* at 1a-15a).

1. Petitioner founded several financial services companies and was their chief executive officer. The companies provided him with "business development funds" that he actually spent on luxury vehicles, mistresses, meals, and other personal items rather than on business matters. Pet. App. 2a; see Gov't C.A. Br. 8-12.

For this scheme and related conduct, a grand jury in the District of Maryland charged petitioner with wire fraud, investment advisory fraud, mail fraud, false statements, and money laundering. Petitioner pleaded not guilty and the case proceeded to a jury trial. Petitioner's lead counsel at trial was William R. Martin, a well-regarded and experienced criminal defense attorney. See Gov't C.A. Br. 18-19 (discussing Martin's background, including his lengthy prior service as a federal

prosecutor, his high-profile representation of public officials and professional athletes, and his recognition in legal and other publications as one of the nation's best defense attorneys).

At trial, the district court allowed the government to introduce, as proof of petitioner's motive to defraud, evidence that petitioner borrowed nearly $1.3 million from his companies and never repaid the loans. Pet. App. 2a; see Gov't C.A. Br. 20. At the conclusion of the trial—which required 34 days of proceedings spanning seven calendar weeks (see *id.* at 4; C.A. App. 41)—the government commented during its rebuttal closing argument that petitioner's failure to repay the loans was relevant "in assessing [his] sense of his fiduciary obligations, in assessing his ability to live within his means." Gov't C.A. Br. 23; see Pet. App. 2a-3a. After the government had concluded its argument and the jury had left the courtroom, Marc Rothenberg, co-counsel for petitioner, contended that the court's decision to admit evidence about the loans for motive purposes did not permit the government's reference to "a breach of fiduciary duty." *Id.* at 31a. The court held the following colloquy with Rothenberg and Martin:

> THE COURT: I tell you what. You might be right. Draft a curative instruction. I'll be glad to give it to the jury. Can you ask them to come in?
>
> MR. ROTHENBERG: And, just for the record, we are moving for a mistrial based upon that.
>
> THE COURT: You want one?
>
> MR. ROTHENBERG: With prejudice.

> THE COURT: Nope. I'll give you a mistrial without one if you want one. I give mistrials regularly. If you want a mistrial, you'll get one.
>
> MR. ROTHENBERG: We're just preserving the record, and wanting one with prejudice, Your Honor.
>
> THE COURT: No. If you want a mistrial, don't play with me on that, because I'll give you a mistrial. I have nothing to do but be here again. If you want to try this at your client's expense again—do you want a mistrial?
>
> MR. MARTIN: No, Your Honor.
>
> THE COURT: I'm sorry. You want a mistrial?
>
> MR. MARTIN: Only with prejudice. If your Honor would consider with prejudice—
>
> THE COURT: No, no, no. I'll give you one without prejudice if you want.
>
> MR. MARTIN: No, Your Honor.
>
> THE COURT: Okay. Granting it would be worth it just to see the look on Mr. Gray's [the lead prosecutor's] face.
>
> (Laughter.)

Id. at 31a-32a.

The district court thereafter read the jury a curative instruction concerning the government's reference to the loans. See Gov't C.A. Br. 29. The court "remind[ed]" the jury that petitioner was "not on trial" for the loans and that "the references were only for proof of another matter." *Ibid.* "[S]pecifically," the court stated, "the Government contends that this is evidence that

he needed money, and therefore, engaged in criminal conduct because of that need for money." *Ibid.*

The jury found petitioner guilty on 23 counts, but it acquitted him of money laundering and various fraud and false-statement counts, and it was unable to reach a verdict on two counts of making false statements on tax returns. Gov't C.A. Br. 4; see Pet. App. 18a n.1. In post-trial motions, the defense argued that the government's reference to the loans in its closing argument warranted acquittal or a new trial on the 23 counts of conviction. Gov't C.A. Br. 30. The district court denied the motions, stating: "I find no conduct on the part of the Government that deprived [petitioner] of a fair trial." *Ibid.* The court sentenced petitioner to 90 months of imprisonment, to be followed by three years of supervised release. *Id.* at 4.

On direct review, in an unpublished decision, the court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing in light of *Booker*, *supra*, which had been decided after petitioner was sentenced. 209 Fed. Appx. 253. This Court denied petitioner's petition for a writ of certiorari. 550 U.S. 949 (2007). On remand, the district court sentenced petitioner to 63 months of imprisonment, to be followed by three years of supervised release. See Gov't C.A. Br. 5; Pet. App. 19a n.2.

2. Pursuant to 28 U.S.C. 2255, petitioner collaterally attacked his convictions, claiming Martin had rendered ineffective assistance by declining the offer of a mistrial without prejudice.[1] Pet. App. 24a-27a; see *id.* at 21a-

[1] Petitioner also claimed counsel had been ineffective in failing to properly preserve an objection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the government's peremptory strikes of African-American jurors. C.A. App. 9-12. The district court rejected that claim (Pet. App.

23a. In support of that claim, petitioner alleged that when the district court "asked Mr. Martin if he wanted a mistrial," "I immediately told * * * Mr. Martin, Yes!, indicating my instructions to accept the mistrial." *Id.* at 24a. Petitioner also attached an affidavit of Nathaniel Jones, an attorney of petitioner's who was not at counsel table during the trial. *Id.* at 28a. According to Jones, when the court asked Martin if the defense wanted a mistrial, Jones "was seated in the first row of the gallery behind the defense table, approximately eighteen feet away," and he "heard [petitioner] say 'yes' to * * * Martin." *Ibid.* Jones further asserted that "[t]here was no discussion between [petitioner] and his defense counsel regarding whether or not to accept [the] offer to grant a mistrial." *Ibid.*

The government opposed petitioner's Section 2255 motion. C.A. App. 23-44. First, the government pointed out that the laughter and the district court's comments at trial—including "I give mistrials regularly," "I have nothing to do but be here again" for another seven-week trial, and "[g]ranting it would be worth it just to see the look on [the prosecutor's] face"—suggested the court had not been serious about granting a mistrial. *Id.* at 33-34 & n.3. Further supporting that view, the government noted, were the court's apparent incredulity when asking defense counsel if he really wanted to retry the lengthy case "at [his] client's expense," and the court's later decision denying petitioner's motions for an acquittal or a new trial, which were based in part on the government's rebuttal closing argument. *Ibid.*

20a), and the court of appeals refused to issue a certificate of appealability on that issue (*id.* at 17a). Petitioner thus did not renew his *Batson*-related claim in the court of appeals and he does not do so in this Court.

Second, the government presented an affidavit from Martin, who attested that he had "t[aken] a moment" to confer with co-counsel and petitioner about the court's offer, and that petitioner had made clear that "he did not want a mistrial" because, in petitioner's view, "his best chance was with this jury." C.A. App. 57; see *id.* at 58 (Martin stating that petitioner "agreed with my view that we should not request a mistrial without prejudice, but instead should accept the curative instruction, preserve the claim of error, and proceed to await the jury's verdict"). Third, the government argued that even if the court's offer of a mistrial had been serious and even if petitioner had told Martin he wanted to accept it, petitioner's claim failed because (a) whether to accept a mistrial is a tactical decision committed to counsel's professional judgment (*id.* at 35-41), and (b) Martin's refusal of the offer was reasonable on the facts of this case (*id.* at 41-43).

Without holding an evidentiary hearing, the district court denied petitioner's Section 2255 motion. Pet. App. 18a-23a. The court noted the conflict between Jones's and Martin's accounts (*id.* at 22a nn.3-5) but did not reconcile the two or comment on whether its offer of a mistrial had been serious. Instead, the court simply observed that it had "offered to grant a mistrial without prejudice" (*id.* at 22a), and it apparently assumed *arguendo* that Martin's refusal of the offer "was against [petitioner's] wishes" (*ibid.*). Nevertheless, the court emphasized that criminal defense attorneys do not "have a duty to consult with their clients * * * on 'every tactical decision.'" *Id.* at 21a (quoting *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004), and *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988)). It held that refusing an offer of a mistrial without prejudice is just such a decision (*ibid.*) and

that Martin's refusal was reasonable on the facts of this case (*id.* at 22a). The court further concluded that, even assuming Martin had been ineffective in refusing the offer, petitioner "failed to show prejudice" because he did not "demonstrate[ ] that [a] trial before a different jury would have ended with [an] acquittal" on the counts of conviction. *Ibid.*

3. The court of appeals granted a certificate of appealability on petitioner's "claim that his counsel was ineffective for ignoring his direction to accept the district court's offer of a mistrial without prejudice" (Pet. App. 17a), and it affirmed (*id.* at 1a-15a).

a. "Because the district court rejected [petitioner's] claim[ ] without holding an evidentiary hearing," the court of appeals reviewed the record "in the light most favorable to" petitioner, and it assumed *arguendo* that (1) the district court "was serious in its offer of a mistrial," and (2) Martin "ignored [petitioner's] instructions to accept" the offer. Pet. App. 4a & n.*. The court nevertheless concluded that Martin had not been ineffective.

Citing *Florida* v. *Nixon*, 543 U.S. 175 (2004), the court of appeals emphasized at the outset that "defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." Pet. App. 5a. It acknowledged that this Court has held that four "fundamental" decisions —whether to plead guilty, waive a jury, testify at trial, or take an appeal—all "belong[ ] exclusively to the defendant." *Ibid.* But it found no case holding that "decisions about mistrials are of such a moment that they can be made only by the defendant himself." *Ibid.* (internal quotation marks omitted). Indeed, the court pointed out that "every circuit to consider the question has concluded

that decisions regarding mistrials belong to the attorney, not the client." *Id.* at 5a-6a (citing cases from the Sixth, Seventh, Eighth, and Eleventh Circuits).

The court of appeals noted that petitioner did not contend "that decisions regarding mistrials are so fundamental that they must be made by the client rather than the attorney," but rather that any time a court offers a mistrial "*and* the defendant expresses his opinion on whether the offer should be accepted, counsel is obligated to follow the defendant's instructions." Pet. App. 7a. The court of appeals rejected such a bright-line rule, holding that "counsel's decision [to decline a mistrial] is not unreasonable simply because the client disagrees." *Id.* at 11a. In the court's view, petitioner's proposed rule would "reallocat[e]" "tactical" decisions from attorneys to their lay defendants and would undermine "the effective operation of our adversarial system." *Id.* at 10a; see *id.* at 7a-10a.

Although the court of appeals thus held that a decision concerning a mistrial "remains counsel's to make even if the client expresses disagreement with the decision" (Pet. App. 11a), it also cautioned that "of course" "[t]he reasonableness of the tactical decision actually made by counsel is * * * subject to challenge" under the traditional ineffectiveness standard established in *Strickland* v. *Washington*, 466 U.S. 668 (1984) (Pet. App. 9a; see *id.* at 3a-4a). Concluding that Martin's refusal of a mistrial was "not unreasonable simply because [petitioner] expressed a contrary view" (*id.* at 9a), and apparently finding no other problem with Martin's decision, the court agreed with the district court that Martin had rendered effective assistance (*id.* at 11a). The court did not address whether, assuming Martin had been ineffective, his ineffectiveness prejudiced petitioner.

b. Judge Michael concurred in the judgment. Pet. App. 12a-15a. In his view, the court's opinion held "that a lawyer's decision to refuse a mistrial over his client's wishes and without consultation can never constitute ineffective assistance." *Id.* at 12a. Judge Michael would have resolved the case on what he believed to be the "narrower grounds" that it was "reasonable here for * * * Martin to refuse the [mistrial] offer against [petitioner's] expressed wishes and without consultation" because the record did not reflect that petitioner "even understood" the consequences of the decision in this case. *Id.* at 14a; see *ibid.* ("Under these circumstances, *following* [petitioner's] instruction might well have constituted ineffective assistance of counsel.").

ARGUMENT

Petitioner renews his contention that his trial counsel rendered ineffective assistance of counsel by declining the district court's offer of a mistrial without prejudice, given that petitioner expressed a desire to accept the offer. Pet. 1-3, 7-15. On the facts of this case, the court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort. Further review is unwarranted.

1. To prevail on a claim of ineffective assistance of counsel, a Section 2255 movant must demonstrate that (1) counsel's representation fell outside "the wide range of reasonable professional assistance," resulting in "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's deficient performance so prejudiced his defense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 687-694 (1984). This standard is necessarily a fact-intensive one, requiring a court to "consider[ ] all the circumstances" when evaluating counsel's performance. *Id.* at 688; see *id.* at 688-689 (a defined "set of detailed rules for counsel's conduct" could not "satisfactorily take account of the variety of circumstances faced by defense counsel"); see also *Rompilla* v. *Beard*, 545 U.S. 374, 394 (2005) (O'Connor, J., concurring) (noting that *Strickland* established a "case-by-case approach").

This Court has repeatedly admonished that, when applying the *Strickland* standard, courts should not adopt any "checklist for judicial evaluation of attorney performance," lest they "restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 688-689; see *Florida* v. *Nixon*, 543 U.S. 175, 178, 187, 192 (2004) (holding that, under *Strickland*'s case-by-case approach, "counsel is not automatically barred" by any "blanket rule" requiring the defendant's "express consent" from pursuing what counsel believes is "the most promising means to avert a sentence of death," because "an attorney has authority to manage most aspects of the defense without obtaining his client's approval") (citing *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988)).

2. Petitioner does not dispute that the district court and the court of appeals applied the *Strickland* standard in evaluating his ineffectiveness claim. See Pet. App. 3a-4a, 19a-20a. Indeed, the petition does not even cite *Strickland*, let alone explain how, in petitioner's view, its reasoning does or does not bear on this case. Instead, petitioner faults the court of appeals for "depart[ing] from" "basic principles of agency law" in "broadly" hold-

ing that "defense counsel alone has the 'right' to make all * * * decisions regarding the conduct of a criminal trial, even over the defendant's express objections," so long as the decision is not one of the four decisions this Court has characterized as fundamental (see p. 8, *supra*). Pet. 1, 10 (emphasis omitted).[2]

Petitioner overstates the holding of the court of appeals. The court did not issue a sweeping decision about agency principles in the attorney-client context. It merely held that, where counsel makes a tactical decision regarding the conduct of trial (here, declining an offer of a mistrial), he is not ineffective per se because the defendant expressed a wish to pursue a different course. See Pet. App. 11a ("[C]ounsel's decision is not unreasonable simply because the client disagrees."); *id.* at 9a (same). That holding is not nearly so "broad[ ]" as petitioner suggests. Significantly, it does not dictate, as the concurrence below suggested, "that a lawyer's decision to refuse a mistrial over his client's wishes and without consultation can *never* constitute ineffective assistance." *Id.* at 12a (emphasis added). To the contrary, the court of appeals recognized that "[t]he reasonableness of the tactical decision actually made by counsel is of course subject to challenge." *Id.* at 9a. Given *Strickland*'s directive to "consider[ ] all the circumstances" when evaluating counsel's performance, 466 U.S. at 688, the reasonableness challenge the court of appeals envisioned could properly take account of, but would not be limited to, the fact that counsel overrode his client's wishes in making a tactical decision.

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[2] Petitioner does not claim the decision here was one on which counsel was required to obtain his consent. See, *e.g.*, Pet. 9 ("The problem here is not that defense counsel rejected the district court's offer of a mistrial without securing [petitioner's] consent.").

It is instead petitioner who proposes a bright-line rule at odds with *Strickland*. He argued in the court of appeals that "defense counsel has no discretion to disregard a defendant's instruction to accept a court's offer of a mistrial." Pet. C.A. Br. 18; see *id.* at 22, 26 (arguing that counsel is not "allowed to disregard" or "free to ignore" "his client's instructions once given," at least where those instructions concern a mistrial) (emphasis omitted). Likewise, in this Court, petitioner contends that criminal defense counsel necessarily "does not provide the 'assistance' guaranteed by the Sixth Amendment by making a tactical decision regarding the conduct of a trial over the defendant's objection." Pet. 7. In short, petitioner asked the court of appeals, and now asks this Court, for a holding that defense counsel is constitutionally deficient per se whenever, and for whatever reason, he disregards the defendant's expressed desire to pursue a given tactical course during trial.

Such a per se rule would conflict with *Strickland*'s "case-by-case" approach. *Rompilla*, 545 U.S. at 394 (O'Connor, J., concurring); see *Nixon*, 543 U.S. at 192 (relying on *Strickland* to reject a "blanket rule" of "explicit consent" in an analogous context). The inflexibility of such a rule would not account for situations where, as here, there is no reason to believe the defendant has any particular insight about the relative costs and benefits of a particular tactical choice. For example, in the context of a choice whether to accept a mistrial, petitioner's rule would not account for cases in which, contrary to the defendant's ill-founded beliefs, his objective best interests would demand continuing with the ongoing trial because of a comparatively favorable evidentiary record, well-received defense witnesses, a smoothly executed closing argument, an apparently sympathetic jury,

or other advantages he may not have on retrial. Cf. *Gonzalez* v. *United States*, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote."). The concurring judge below even suggested (Pet. App. 14a) that in this very case, petitioner's counsel might have been ineffective if he had *acceded* to petitioner's alleged desire for a mistrial. And, indeed, if petitioner had obtained a mistrial and proceeded through another trial before a different jury—at great expense to himself and the court system, given the complexity of the case—he may have been convicted on counts of which the jury here actually acquitted him. *Strickland* allows for a balanced consideration of such practical and varying realities; petitioner's approach would ignore them.

3. Contrary to petitioner's contention (Pet. 8-9), the court of appeals' rejection of his approach does not conflict with this Court's decision in *Faretta* v. *California*, 422 U.S. 806 (1975). *Faretta* addressed "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.* at 807. The Court concluded that "a State may not constitutionally do so." *Ibid.* As a narrow factual matter, *Faretta* is inapposite because petitioner does not contend he wished to proceed pro se at any point in the

trial, let alone that he expressed such a wish. Moreover, as a legal matter, *Faretta* does not speak to whether, once the defendant retains counsel, that attorney is per se ineffective if he disregards the defendant's expressed desire to pursue a particular tactical course (such as accepting a court's offer of a mistrial).

Petitioner correctly notes that *Faretta* recognizes a represented defendant's "power, if present [at his trial], to give advice or suggestion *or even to supersede his lawyers altogether*." Pet. 9 (quoting *Faretta*, 422 U.S. at 816) (emphasis added by petitioner). But petitioner omits the crucial concluding phrase of this sentence: a represented defendant has the power "to supersede his lawyers altogether *and conduct the trial himself.*" *Faretta*, 422 U.S. at 816 (emphasis added). *Faretta* thus does not hold, as petitioner suggests (Pet. 8), that a represented defendant's counsel (who is retained through the conclusion of the case and is not "supersede[d] * * * altogether") is ineffective if he does not obtain the defendant's consent to a tactical decision. To the contrary, *Faretta* admonishes that "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." 422 U.S. at 820. The court of appeals did not run afoul of *Faretta* in concluding that those "binding decisions of trial strategy" include the decision of whether to accept an offer of a mistrial.

Indeed, petitioner seems to envision a regime in which any counseled defendant can at any time and for any reason "limit [his counsel's] agency" (Pet. 1) by countermanding any mid-trial tactical decision by his counsel. But he offers no precedent supporting the view that the *Faretta* right can be invoked in such a piece-

meal fashion. *Faretta* surely permits a defendant to revoke his attorney's agency *entirely* (though there may be constraints on when and how such a revocation may be effected). But there is no authority from this Court that a defendant may selectively elect to proceed with counsel at one moment, pro se at the next moment, and again with counsel at the next. That is in every effect what petitioner contends should have occurred at his trial, but the Sixth Amendment does not give him that option. This Court's cases hold that he is guaranteed either the effective assistance of counsel to whose reasonable professional judgment tactical decisions are committed, or else the right to proceed pro se. Cf. *McKaskle* v. *Wiggins*, 465 U.S. 168, 183 (1984) ("*Faretta* does not require a trial judge to permit 'hybrid' representation.").

4. The court of appeals' decision does not conflict with the state court decisions petitioner cites (Pet. 2-3, 13-14). In general, those cases hold that a defendant does not necessarily receive ineffective assistance of counsel (or is not entirely deprived of counsel) when the defendant's attorney accedes to the defendant's wishes regarding trial tactics. But the inverse proposition petitioner advances—that a defendant's rights are *always* violated when his attorney *refuses* to abide by the defendant's tactical wishes—does not follow as a matter of law or logic. Accordingly, those cases are consistent with the decision below.

In *State* v. *Brown*, 451 S.E.2d 181 (N.C. 1994), cert. denied, 516 U.S. 825 (1995), the defendant argued on direct appeal that where he had "refused to cooperate" with his attorney "in the preparation of his defense"—including in making various strategic decisions—the trial court had "effectively allowed him to proceed with-

out counsel" in violation of the Sixth Amendment. *Id.* at 186. The North Carolina Supreme Court rejected this contention, pointing out that "[e]very time the trial court asked if he wanted to dismiss his attorney and represent himself, defendant chose to keep his attorney." *Ibid.* The defendant did not claim his attorney had been ineffective; rather, he claimed the trial court should have "ordered him to *abide* by the decisions of his attorney." *Ibid.* (emphasis added). The North Carolina Supreme Court had no occasion to apply, or even mention, *Strickland.* Much less did it hold, contrary to the court of appeals' decision in this case, that counsel is per se ineffective under *Strickland* whenever he disregards the defendant's expressed desire for a mistrial.

Similarly, in *State* v. *Ali*, 407 S.E.2d 183 (N.C. 1991), a case on direct appeal, the defendant claimed that the trial court and his attorneys "denied [him] the right to counsel" in allowing him "to make the decision not to peremptorily challenge a juror his attorneys had wanted to remove." *Id.* at 188. The North Carolina Supreme Court rejected his claim, holding that it was not unreasonable for the trial court or the defense attorneys to acquiesce in the defendant's wishes concerning the juror. *Id.* at 189-190 (rejecting any claim of ineffective assistance, and citing a similar case in which an attorney, despite his strategic inclinations to the contrary, reasonably acquiesced in his client's wishes to call a particular witness). The court of appeals' decision in this case does not conflict with *Ali*, because in both cases the courts found counsel to have acted reasonably. *Ali* does not hold that it would be per se ineffective assistance of counsel for an attorney to refuse to follow his client's instructions concerning a strategic trial decision. See *id.* at 189.

Zagorski v. *State*, 983 S.W.2d 654 (Tenn. 1998), cert. denied, 528 U.S. 829 (1999), is likewise distinguishable from the decision below. In *Zagorski*, the defendant was convicted of capital murder and "unequivocally" told his attorneys not to present any mitigating evidence at sentencing because "he preferred death instead of a possible sentence of life in prison." *Id.* at 656. He later collaterally attacked his death sentence, arguing that his attorneys had been ineffective "in failing to investigate and present mitigating evidence despite his instructions to the contrary." *Id.* at 657. The Tennessee Supreme Court rejected the claim. *Id.* at 658. "Under these exceptional circumstances," the court reasoned, "the critical issue" was whether the attorneys could reasonably "follow the lawful demands of [their] client." *Ibid.* Relying heavily on Tennessee's code of professional responsibility, the court concluded that it was not unreasonable for the attorneys to abide by the defendant's wishes not to present mitigating evidence. *Ibid.* Again, that does not conflict with the decision below because the court below said nothing about the effectiveness *vel non* of an attorney who *follows* his client's self-defeating strategic instructions.[3]

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[3] The decisions in *Brown*, *Ali*, and *Zagorski* each contain broad language indicating that it is ultimately the defendant's wishes, rather than counsel's professional judgment, that should govern in the event of a disagreement. See *Zagorski*, 983 S.W.2d at 658-659; *Brown*, 451 S.E.2d at 186-187; *Ali*, 407 S.E.2d at 189. But that broad language is primarily focused upon a determination of the ethical duties of counsel under the applicable ethical rules. See *ibid.* This Court has made clear that counsel's ethical responsibilities under applicable local rules are distinct from the constitutional requirement of effective representation. See, *e.g.*, *Nix* v. *Whiteside*, 475 U.S. 157, 165 (1986) ("Under the *Strickland* standard, breach of an ethical standard does not necessarily make out

Petitioner cites only one case, *United States* v. *Burke*, 257 F.3d 1321 (11th Cir. 2001), cert. denied, 537 U.S. 940 (2002), that squarely addresses whether "defense counsel [is] per se ineffective" where he overrides his client's "request to consent to a mistrial." *Id.* at 1323 & n.2. And as petitioner notes (Pet. 7-8, 12-13), *Burke*, like the decision below, answered that question in the negative. 257 F.3d at 1323-1324. Accordingly, there is no conflict of authority calling for this Court's review.

5. Even if there were a conflict, this case would be a poor vehicle for resolving it, for two reasons.

First, even if this Court were to grant review and hold that defense counsel is per se ineffective under *Strickland* whenever he disregards his client's expressed desire for a mistrial, it is not at all clear that that is what happened in this case. Both the district court and the court of appeals assumed as true petitioner's (and attorney Jones's) allegation that petitioner expressed a desire to accept a mistrial and that Martin disregarded the instruction. Pet. App. 4a & n.*, 22a. But Martin attested that he had conferred with co-counsel and petitioner about the district court's offer of a mistrial, and that petitioner had made clear that "he did not want a mistrial" because, in petitioner's view, "his best chance was with this jury." C.A. App. 57; see *id.* at 58 (Martin stating that petitioner "agreed with my

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a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.").

view that we should not request a mistrial without prejudice, but instead should accept the curative instruction, preserve the claim of error, and proceed to await the jury's verdict"). The courts below did not resolve this evidentiary conflict, and thus, even if this Court accepted petitioner's legal submission, there is considerable doubt whether petitioner would ultimately be able to establish his counsel's ineffectiveness after further proceedings on remand.

Second, even if this Court accepted petitioner's legal contention, and even if his version of the facts prevailed, petitioner would still be required to prove under the second part of the *Strickland* test that he was prejudiced. But the district court has already concluded, correctly, that petitioner suffered no prejudice. Pet. App. 22a. The court based that conclusion on petitioner's failure to "demonstrate[ ] that [a] trial before a different jury would have ended with [an] acquittal" on the counts of which he had been convicted. *Ibid.* Petitioner has not challenged that conclusion in this Court, and thus offers no reason to believe that even a favorable decision here would ultimately lead to any meaningful relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-241

IN THE
Supreme Court of the United States

NATHAN A. CHAPMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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1. The brief in opposition distorts, rather than defends, the decision below. According to the Government, the Fourth Circuit adopted a totality-of-the-circumstances approach to determining whether defense counsel provides the "Assistance" guaranteed by the Sixth Amendment in making a tactical decision regarding the conduct of a criminal trial over the defendant's objection. In particular, the Government contends that the Fourth Circuit "merely held that, where counsel makes a tactical decision regarding the conduct of a trial (here, declining an offer of a mistrial), he is not ineffective per se because the defendant expressed a wish to pursue a different course." Opp. 12. Under this approach, the Government asserts, the Sixth Amendment inquiry "could properly take account of, but would not be limited to, the fact that counsel overrode his client's wishes in making a tactical decision." *Id.*

That is not what the Government argued below, and not what the Fourth Circuit held. To the contrary, the Fourth Circuit "agree[d] with the government" that tactical decisions at trial "belong[] to the attorney," and that a defendant's disagreement with those decisions is "*simply irrelevant*." Pet. App. 4a (emphasis added); *see also id.* at 8a ("[W]e believe that whether to seek or accept a mistrial is a matter left to the sound judgment of counsel, even if the client disagrees with counsel's decision."). Thus, while "[t]he reasonableness of the tactical decision actually made by counsel is of course subject to challenge," *id.* at 9a, a defendant's objection to that decision has no bearing on any such challenge. This is not the narrow, fact-intensive approach described by the

Government; rather, this is a "broad rule" that gives defense counsel *carte blanche* to override his client's objections. *Id.* at 12a (Michael, J., concurring in the judgment). If, as the Fourth Circuit held, defense counsel has "the *right* to make tactical decisions about the conduct of a criminal trial [even] if the client expresses disagreement with the attorney's decision," *id.* at 11a (emphasis added), it follows that a criminal defendant has no right to control his own defense.

2. The Government chides petitioner for "propos[ing] a bright-line rule" that defense counsel must abide by his client's instructions. Opp. 13. According to the Government, "[s]uch a per se rule would conflict with [the] case-by-case approach" to ineffective-assistance claims adopted by *Strickland v. Washington*, 466 U.S. 668 (1984). Opp. 13. That alleged "conflict" is illusory.

The issue here, after all, is whether counsel provides "Assistance" *at all* where he makes a tactical decision regarding the conduct of a criminal trial over the defendant's objection. That issue was not presented in *Strickland*, and does not require a totality-of-the-circumstances inquiry. The Sixth Amendment, by its terms, guarantees a criminal defendant the right to "the *Assistance* of Counsel for *his* defence." U.S. Const. amend. VI (emphasis added). Where counsel overrides the defendant's instructions, "the defense presented is not the defense guaranteed [the defendant] by the Constitution, for, in a very real sense, it is not *his* defense." *Faretta v. California*, 422 U.S. 806, 821 (1975) (emphasis added); *see also id.* at 820 ("[A]n assistant, however expert, is still an assistant.").

The Constitution itself, in other words, establishes the very "bright-line rule" that the Government now derides.

3. It is no answer to assert, as does the Government, that criminal defendants may exercise their Sixth Amendment rights unwisely. Those rights do not depend on whether a defendant "has any particular insight about the relative costs and benefits of a particular tactical choice." Opp. 13. As noted above, the Sixth Amendment "grants to the accused *personally* the right to make his defense." *Faretta*, 422 U.S. at 819 (emphasis added). Thus, even if a defendant's tactical decision is "ill-founded" and contrary to "his objective best interests," Opp. 13, it is still his decision to make. If, as the Fourth Circuit held, defense counsel has the "right" to make tactical decisions over the defendant's objection, Pet. App. 11a, counsel would be "not an assistant, but a master; and the right to make a defense [would be] stripped of the personal character upon which the [Sixth] Amendment insists," *Faretta*, 422 U.S. at 820 (footnote omitted). Indeed, this Court has specifically rejected the Government's paternalistic approach by holding that a criminal defendant has the "power, if present [at his trial], to give advice or suggestion *or even to supersede his lawyers altogether* ...." *Id.* at 816 (emphasis added).

The Government tries to distinguish *Faretta* on concededly "narrow" grounds. Opp. 14. According to the Government, *Faretta* stands only for the proposition that a defendant has the right to decline the assistance of counsel altogether and proceed *pro se*. *See id.* at 14-16. Under this view, a defendant represented by counsel necessarily surrenders the

right to control his defense, so that "he is guaranteed *either* [1] the effective assistance of counsel to whose reasonable professional judgment tactical decisions are committed, *or else* [2] the right to proceed pro se." *Id.* at 16 (emphasis added).

The Sixth Amendment, however, does not present a criminal defendant with such a Hobson's choice. It is certainly true that "'when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.'" *Id.* at 15 (quoting *Faretta*, 422 U.S. at 820). But that is true only insofar as the defendant does not affirmatively object to his counsel's tactical decisions. Where, as here, the defendant *does* affirmatively object to his counsel's tactical decisions, it is the defendant's decision, not counsel's decision, that must control. *See, e.g.*, *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1999); *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994); *State v. Ali*, 407 S.E.2d 183, 188-90 (N.C. 1991).

Contrary to the Government's suggestion, that does not mean "that a defendant may selectively elect to proceed with counsel at one moment, pro se the next moment, and again with counsel the next." Opp. 16. Petitioner is not proposing any such "'"hybrid" representation.'" *Id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984)). Rather, a criminal defendant represented by counsel retains the right to conduct his own defense (which includes the right to make tactical decisions at trial), should he choose to exercise that right. If defense counsel believes that honoring that right would conflict with his own professional obligations, he may seek to

withdraw from the representation. But defense counsel may not simply override a defendant's express objection to a tactical decision, and then leave the defendant bound by the very decision to which he objected.

4. It follows that the Government begs the question presented here by insisting that defense counsel must have "'wide latitude ... in making tactical decisions.'" Opp. 11 (quoting *Strickland*, 466 U.S. at 688-89). Petitioner has no quarrel with that proposition in the abstract, but only to the extent that "'the wide range of reasonable professional assistance,'" Opp. 10 (quoting *Strickland*, 466 U.S. at 689) is deemed to encompass the situation in which counsel overrides his client's express instructions. To say that counsel "'has authority to manage most aspects of the defense without obtaining his client's *approval*,'" Opp. 11 (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (emphasis added; citing *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)), is not to say that counsel has authority to manage most aspects of the defense over his client's *objection*. The "wide latitude" typically enjoyed by defense counsel, after all, "can only be justified ... by the defendant's consent." *Faretta*, 422 U.S. at 820. To the extent that a defendant expressly withdraws such consent, counsel's otherwise "wide latitude" is narrowed accordingly.

It is telling that the Government offers no response whatsoever to Justice Scalia's observation that "action taken by counsel over his client's objection ... would have the effect of revoking the agency with respect to the action in question." *Gonzalez v. United States*, 553 U.S. 242, 254 (2008)

(opinion concurring in the judgment). Nor does the Government offer any response to the many cases cited in the petition for the proposition that a criminal defendant ""is bound by his counsel's choice *in the absence of express objection.*"" Pet. 12 (quoting *Watkins v. Kassulke*, 90 F.3d 138, 142-43 (6th Cir. 1996) (emphasis added in petition; in turn quoting *Armstrong v. United States*, 367 F.2d 821, 821 (7th Cir. 1966)); *see also Hawkins v. Hannigan*, 185 F.3d 1146, 1155 (10th Cir. 1999); *United States v. Stephens*, 609 F.2d 230, 232-33 (5th Cir. 1980); *cf. Gonzalez*, 553 U.S. at 246. Needless to say, these cases would make little sense if, as the Fourth Circuit held below and the Government now reaffirms, criminal defendants are bound by their counsel's tactical decisions *even where*, as here, they expressly objected to those decisions.

5. The Government asserts that *Brown*, *Ali*, and *Zagorski*, in which the Supreme Courts of North Carolina and Tennessee, respectively, recognized a defendant's Sixth Amendment right to override his counsel's tactical decisions, "are consistent with the decision below." Opp. 16. That assertion is incorrect.

In each of those cases, a criminal defendant sought relief from a tactical decision that he was allowed to make over his counsel's objection. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59. In sharp contrast to the decision below, both Supreme Courts held that criminal defendants have a federal constitutional right under *Faretta* to make such decisions, and are thus bound by them. "[W]hen counsel and a fully informed criminal defendant

client reach an absolute impasse as to ... tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali*, 407 S.E.2d at 189 (internal quotation omitted); *see also id.* ("The attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred.") (internal quotation omitted); *Brown*, 451 S.E.2d at 186-87 (same); *Zagorski*, 983 S.W.2d at 658 ("Ultimately, ... the right to a defense belongs to the defendant."); *id.* at 658-59 ("When a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision.").

The difference between those cases and this one is purely procedural: the trial courts in those cases allowed the *defendants* to override their counsel, whereas the trial court here allowed *counsel* to override the defendant. Accordingly, even though the North Carolina and Tennessee Supreme Courts announced a rule of federal constitutional law diametrically at odds with the decision below, the defendants lost in all cases—the defendants lost in the state cases because they had in fact exercised their Sixth Amendment right to override counsel, whereas petitioner lost below on the ground that he had no such right in the first place. *Cf. State v. Freeman*, 690 S.E.2d 17, 21-22 (N.C. Ct. App. 2010) (holding, based on *Ali*, that a defendant was entitled to a new trial where the trial court erroneously allowed counsel to override the defendant on a tactical decision at trial). As explained in the petition, the upshot is the anomalous situation that a criminal defendant in state court in North Carolina

has a federal constitutional right to override his counsel on tactical decisions, whereas a criminal defendant in federal court in North Carolina has no such right. *See* Pet. 14-15.

The Government acknowledges in a footnote that "[t]he decisions in *Brown*, *Ali*, and *Zagorski* each contain broad language indicating that it is ultimately the defendant's wishes, rather than counsel's professional judgment, that should govern in the event of a disagreement." Opp. 18 n.3. The Government asserts, however, that this language "is *primarily focused* upon a determination of the ethical duties of counsel under the applicable ethical rules." *Id.* (emphasis added). That assertion is baseless. Each decision addresses the point in the context of a discussion of the defendant's federal rights under the Sixth Amendment. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59. And even if there were any ambiguity on this score, this Court will deem a state court's decision to be based on federal law unless the court "indicates clearly and expressly" that the decision is based only on state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). There is no such indication in any of the state-court decisions at issue here.

6. Finally, the Government argues that "[e]ven if there were a conflict, this case would be a poor vehicle for resolving it, for two reasons." Opp. 19. This argument too is unavailing.

The Government first argues that "it is not at all clear" that defense counsel here in fact disregarded petitioner's instructions, as the record contains conflicting evidence on this point. *Id.* Because the district court denied petitioner relief without

providing an evidentiary hearing, it is necessary (as the Fourth Circuit majority recognized) to accept the truth of petitioner's factual allegations. *See* Pet. App. 4a n.*. Accordingly, the Fourth Circuit decided this case on the purely legal ground that a criminal defendant has no right to override his counsel with respect to tactical decisions at trial, *see* Pet. App. 4-11a, and that legal issue is squarely presented for this Court's review. Indeed, this case presents a good vehicle for reviewing that legal issue precisely because the facts pleaded by petitioner must be assumed to be true, so there is no factual complexity.

It is telling in this regard that the Government does not endorse the explicitly fact-based approach followed by Judge Michael in his concurrence in the judgment below. *See* Pet. App. 12-15a. While Judge Michael correctly rejected the panel majority's "broad" and "ill-advised" legal rule, *id.* at 12a, he incorrectly concluded that petitioner should lose on the specific facts of this case without accepting the truth of petitioner's version of those facts, *see id.* at 14a. The Government cannot, and does not, defend this approach; rather, the most the Government says is that petitioner may lose on factual grounds in "further proceedings on remand." Opp. 20. But the possibility that a litigant may lose on factual grounds in subsequent proceedings provides no basis for this Court to deny review of a legal issue that will determine whether subsequent proceedings are warranted in the first place.

The Government next argues that "even if this Court accepted petitioner's legal contention, and even if his version of the facts prevailed, petitioner would still be required to prove under the second

prong of the *Strickland* test that he was prejudiced." Opp. 20. Again, the Government suggests that this Court's review is unwarranted because of the possibility that "even a favorable decision here" might not "ultimately lead to any meaningful relief" in proceedings on remand. *Id.* And again, that suggestion is meritless: as noted above, the possibility that a litigant may lose on alternative grounds in subsequent proceedings provides no basis for this Court to deny review of a legal issue that will determine whether subsequent proceedings are warranted in the first place.

In any event, the Government's argument is based on a highly selective rendition of the procedural history. As the Government notes, the district court "concluded ... that petitioner suffered no prejudice." Opp. 20 (citing Pet. App. 22a); *see also* Pet. App. 22a ("[Petitioner] has not demonstrated that trial before a different jury would have ended with his acquittal."). What the Government omits is that petitioner expressly challenged that conclusion in the Fourth Circuit. *See* Petr.'s C.A. Br. 28-30 (Section II of petitioner's opening brief: "The Ineffective Assistance Of Counsel Prejudiced Chapman."); Petr.'s C.A. Reply Br. 10-16 (same in petitioner's reply brief).

As petitioner explained in the Fourth Circuit, the prejudice inquiry asks whether "there is a 'reasonable probability' that, absent the alleged deficiency, 'the result of *the proceeding* would have been different.'" Petr.'s C.A. Br. 28 (emphasis added; quoting *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007) (in turn quoting *Strickland*, 466 U.S. at 694)); *see also* Petr.'s C.A. Reply Br. 10 (same). The district

court erred by focusing on whether the result of a *different* proceeding—another trial "before a different jury"—would have been different. Pet. App. 22a. There is no question that the result of *the proceeding in which the ineffective assistance was rendered* would have been different but for the ineffective assistance: if counsel had followed petitioner's instructions, the trial would have ended in a mistrial as opposed to a partial guilty verdict. *See generally United States v. Ramsey*, 323 F. Supp. 2d 27, 38-43 (D.D.C. 2004).

Because the Fourth Circuit concluded that "[t]he district court ... properly rejected [petitioner's] claim that his attorney provided constitutionally ineffective assistance of counsel," Pet. App. 11a, the appellate court did not address the prejudice issue. It is thus misleading for the Government to assert that "[p]etitioner has not challenged [the district court's] conclusion [on prejudice] in *this* Court," Opp. 20 (emphasis added), as if to suggest that petitioner had forfeited that challenge. Petitioner obviously had no reason to challenge the district court's conclusion on prejudice in *this* Court where the Fourth Circuit ruled against petitioner without reaching that issue. If this Court grants review and reverses the decision below, the parties will have ample opportunity to litigate the prejudice issue.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the Court should grant a writ of certiorari.

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